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In the Supreme Court of the United States

OCTOBER TERM [redacted] 1969

MOJAVE URANIUM COMPANY,
a Nevada corporation,
Petitioner,

vs.

MESA PETROLEUM COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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a Nevada corporation,
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MESA PETROLEUM COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Utah, entered in the above-entitled case on March 5, 1969.

OPINION BELOW

The opinion of the Supreme Court of the State of Utah (R 92) is reported at 451 P.2d 587.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was made and entered on March 5, 1969, (R 92) and a copy thereof is appended to this petition in appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

Petitioner brought this action against respondent to recover $20,000.00 upon the latter's assumption agreement to pay and discharge the obligation to petitioner of Standard Gilsonite Company (herein called Standard), respondent's predecessor in interest. Standard, while a debtor in possession under Chapter XI of the Bankruptcy Act and at a time before confirmation of its arrangement, agreed to pay petitioner $20,000.00 at the rate of $2,000.00 per year in exchange for the release of a chattel mortgage held by petitioner upon certain of Standard's personalty. The mortgage was released, but no payment was ever made to petitioner therefor. The mortgage in question and the obligation it had secured antedated the filing of Standard's initiatory petition under Chapter XI by several years. Standard's arrangement, proposing a composition of its unsecured debts, was confirmed several months after its new agreement with petitioner. Among the defenses asserted by respondent was that the claim of petitioner was discharged upon confirmation of Standard's arrangement. On reciprocal motions for summary judgment, the lower court granted summary judgment in favor of respondent upon the basis

that the claim of petitioner was "barred by the provisions of the Bankruptcy Act." (R. 61-62) Its judgment is appended hereto at Appendix D. The Supreme Court of Utah affirmed, holding that the cleavage date for determining the secured or unsecured status of a debt and its dischargeability in a Chapter XI proceeding is the date of confirmation, not the date of filing; and that the decision of this Court to the contrary in the case of *Zavelo v. Reeves*, 227 U.S. 625, 33 S.Ct. 365, 57 L.Ed. 677 (1913) has no application to Chapter XI of the Bankruptcy Act. The sole question presented is:

> Whether confirmation of an arrangement under Chapter XI of the Bankruptcy Act discharges unsecured claims incurred by the debtor *after* filing of the initiatory petition under Section 322, but before the date of confirmation.

STATUTES INVOLVED

The pertinent portions of the Bankruptcy Act of 1898, and the Bankruptcy Act of 1938, as amended, (11 U.S.C. 1) are set forth in Appendices B and C respectively.

STATEMENT OF THE CASE

On May 25, 1962, Standard filed its initiatory petition for an arrangement under Section 322 of Chapter XI of the Federal Bankruptcy Act (11 U.S.C. Sec. 722) in the United States District Court for the District of Utah. (Ex. P-1) Counsel for Standard in the arrangement proceedings was Bruce E. Coke, an attorney of Salt Lake City, whose deposition was pub-

lished below. On May 25, 1962, Standard either was, or believed that it was, indebted to petitioner upon a promissory note dated March 2, 1960, in the amount of $26,000.00, the payment of which was secured by a Chattel Mortgage upon Standard's mining and office equipment and vehicles. (R-54, 55; Exs. P-1, P-2, P-17; Depo. pp. 9, 12, 16, 48, 49, 51) On June 12, 1962, Standard filed in said arrangement proceedings, among other things, its statement of executory contracts and its schedules of debts and assets. In paragraph 3 of the statement of executory contracts and on its A-2 Schedule, Standard duly listed and described the obligation then owing to petitioner and characterized it as *secured* and *neither* contingent, unliquidated or disputed. (Ex. P-2; Depo. pp. 34-35)

After the filing of the petition for arrangement and presumably sometime in June of 1962, petitioner and Standard consumated a novation of this secured debt by a release of petitioner's mortgage in exchange for Standard's new agreement to pay the sum of $20,000.00 with 5% interest at the rate of $2,000.00 per year. (Exs. P-6, P-7; R-55, 68, 84; Depo. pp. 10, 11, 12, 13, 19, 41, 45, 46) Petitioner, along with other *secured* creditors, was dealt with on an individual basis outside the framework of the Chapter XI proceedings, because Coke correctly advised his principals that *only unsecured* creditors could be provided for in a duly confirmed plan of arrangement under Chapter XI. (Depo. pp. 20, 23, 41, 43, 48)

Thereafter, Standard filed with the court a plan of arrangement proposing a composition, which was confirmed by Order dated August 13, 1962. (Ex. P-3)

This new indebtedness to Petitioner for the new amount and upon the new terms stated above appears on all eight balance sheets and financial statements prepared by or in behalf of Standard subsequent to the date of confirmation to and including September 10, 1965, the date of the acquisition of Standard's property and business by Respondent. These financial statements reflected Standard's liability picture as of August 31, 1962; December 31, 1963; January 31, 1964; February 29, 1964; December 31, 1964; April 30, 1965; May 31, 1965; and September 10, 1965, the date of acquisition. (Exs. P-5, pp. 6 and 7; P-8; P-9; P-10; P-16; Depo. pp. 6, 7, 8, 33, 34)

On the 10th day of September, 1965, Standard transferred substantially all its assets, properties and business to Mesa in accordance with their "Agreement for Purchase and Sale of Assets and Plan of Reorganization" of July 6, 1965. (Exs. P-10, P-11, P-12, P-13, P-14, P-15, P-16) Pursuant to the terms of said agreement Mesa agreed to assume, pay and discharge the new indebtedness to petitioner. (Ex. P-10, and Ex. A annexed thereto)

In affirming the lower court's decision that petitioner's claim was discharged, the Utah Supreme Court, Mr. Justice Ellett dissenting, was required to hold that this court's decision in the case of *Zavelo v. Reeves, supra,* was no longer the law under Chapter XI of the present Bankruptcy Act. The Utah court concluded that ". . . unsecured claims are determinable and dischargeable *as of the date the arrangement ultimately is confirmed* . . ." It further held, "that the order confirming the arrangement in a Chapter XI case deter-

mines the rights of all unsecured creditors *who were such at the time of confirmation, irrespective of their status at the time a petition was filed.*"

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Utah should be reviewed because its erroneous interpretation and application of the provisions of Section 371 of the Bankruptcy Act (11 U.S.C. 771) has seriously impaired and restricted the effective use of debtor-relief proceedings under the Bankruptcy Act in the State of Utah. The holding by the court that unsecured indebtedness incurred and created anytime prior to confirmation (whether before or *after* the initiating petition) is subject to discharge will greatly discourage trade creditors from continued extension of credit after filing in order to maintain the debtor's business pending confirmation. As Justice Ellett points out in his dissent, it will likewise discourage any infusion of debt capital that is often required to fund the arrangement itself.

Admittedly, where the debtor obtains an order authorizing it to continue in business as a "debtor in possession" under the aegis of the court pending confirmation, obligations incurred with the express or implied consent of the court are entitled to priority as costs of administration and to payment in full upon confirmation from the deposit required under Section 337 (2) of the Bankruptcy Act. (11 U.S.C. 737 (2)) See, 9 Collier on Bankruptcy, 14th Ed., Sec. 8.11, p. 180, and Sec. 7.05, pp. 24-25. In many cases, however, that deposit may not be forthcoming, depending upon the amount and nature of such priority claims and the ex-

tent thereof and the amount of cash available to the debtor. As often occurs, therefore, trade creditors, as well as other priority claimants, preferring to keep the debtor in business, will often waive the deposit under Section 337 (2) and look to full payment subsequent to confirmation. This device permits the debtor to achieve confirmation and ultimate rehabilitation, where for lack of cash it otherwise may be unable both to fund an arrangement and make the full requisite deposit. Under the decision of the Utah court the alternative of waiver of the deposit has been effectively eliminated from the Act.

The Utah decision further fails to consider the plight of post filing creditors who, through the debtor's inadvertence or design, may be omitted from the deposit without their consent or knowledge. Such debts also will be subject to discharge now. There is a natural reluctance on the part of creditors to extend credit to a financially distressed debtor operating under the jurisdiction of the bankruptcy court. The Utah decision will convert such reluctance into absolute refusal.

The Utah decision, of course, has also severely hampered the distressed debtor in its relationship with its secured creditors. As is often the case with a Chapter XI debtor, its assets, vital and necessary to its business, are encumbered by liens or mortgages calling for burdensome periodic installment payments. Before the decision of the Utah court, the debtor was in a position to deal with the lien holder in an attempt to accomplish an extension of the secured debt outside of the framework of Chapter XI. In most instances the security will bring on liquidation less than the balance due

under the lien. The debtor, on the other hand, is unable to finance the purchase of new or replacement equipment. It was, therefore, mutually advantageous for both parties to attempt to recast the terms of payment after the petition was filed. The debtor retained the property with reduced installment payments and the creditor held a valid enforceable loan for the full mortgage balance unaffected by the discharge. A commitment to do this was often obtained preliminarily preparatory to filing the Chapter XI petition. No longer is this feasible. Under the Utah decision no binding promise is possible until *after* confirmation. Confirmation in many cases may be achieved only after a prolonged period during which the lien holder's security will be of even less value through normal use and depreciation. The result is obvious. Either the debtor must somehow continue to make full payment and thereby impair his chances of a successful plan of arrangement or the lien holder will reclaim immediately in order to realize the most it can on its security.

These consequences could have been avoided had the Utah Court followed this Court's decision in *Zavelo v. Reeves,* supra. It is submitted that the *Zavelo* case is still the law and controlling in the instant case. That case bears a remarkable factual similarity to the case at bar. There the debtor, *after* filing for a composition under former section 12 of the Act of 1898, promised to pay a claim in full that otherwise would have been subject to the composition and discharged. The promise was made *prior* to confirmation and discharge. The plaintiffs not only accepted the proposed composition, they were paid and received a dividend thereunder. This

Court, nevertheless, in holding the debtor liable for the full amount upon the theory of revival, states as follows:

> "It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. *The theory is that the discharge destroys the remedy, but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time;* that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. *And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge . . .* " (Emphasis supplied)

This Court then made the following analysis of applicable sections of the Act to determine the time to which a discharge upon confirmation related:

> "Our attention is not called to any decision in point arising under the present bankruptcy act; but we deem it clear that the same rule should be applied. If there is any distinction between this and former acts that would require a different rule, it must arise from the time to which the discharge is made to relate. As to this, Sec. 17 of the act of 1898 declares that 'a discharge in bankruptcy shall release a bankrupt from all his prov-

able debts,' with certain exceptions not now pertinent. For the definition of 'provable debts' we are referred to Sec. 63, which is set forth in full in the margin. Of the several classes of liabilities, those in clauses 1, 2, and 3 are in terms described as existing at or before the filing of the petition. Clause 5 relates to liabilities 'founded upon provable debts reduced to judgment after the filing of the petition,' etc.; plainly meaning that they arose before its filing. Clause 4 describes simply debts that are 'founded upon an open account, or upon a contract, express or implied,' not in terms referring to the time of the inception of the indebtedness. But, reading the whole of Sec. 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under Sec. 63a, cl. 4 include only such as existed at the time of the filing of the petition in bankruptcy. . . ."

* * *

"And so upon the whole matter, we conclude that under the present act an express promise to pay a provable debt is good although made after the filing of the petition and before discharge."

"What has been said disposes at the same time of the contention that the promises set up in the two replication under consideration were discharged by the confirmation of the composition. *As these obligations were entered into after the adjudication of bankruptcy, they were, of course, not provable under Sec.* 63; *and only provable debts are discharged.*" (Emphasis supplied)

Completely overlooking the fact that the *Zavelo* case involved a composition proceeding and not a "straight" liquidating bankruptcy, the majority of the Utah court curiously justified its refusal to follow that decision as follows:

> "We believe the reason that Zavelo is not applicable to a Chapter XI case is because of its incompatibility with the widely extended objectives of the Chandler Act and its modified philosophy designed to prevent bankruptcy rather than merely to furnish a sanctuary immunizing one against continuous harassment in a hopeless situation of financial despair."

Former Section 14c of the Bankruptcy Act of 1898, under which *Zavelo* was decided, provided as follows:

> "The confirmation of a composition discharges the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

Section 371 of the present Act provides:

> "The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, *but excluding such debts as, under Section 17 of this Act, are not dischargeable*." (Emphasis supplied)

Former Section 14c made no specific reference to former Section 17. Yet, this Court in *Zavelo* logically referred to former Section 17 in order to determine those debts to which a discharge relates; and Congress by Section 371 specifically adopted the same approach.

The applicable language of former Section 17 quoted above by this Court is identical with that of present Section 17. (11 U.S.C. 35) Both the present and former section provided that, "a discharge in bankruptcy shall release a bankrupt from all his *provable* debts."

Despite the specific reference now made to Section 17 in Section 371, the Utah court completely ignored it, although, as stated at 9 Collier, op cit., Sec. 9.32, p. 397:

> *"Section 371 specifically excludes from the operation of a discharge 'such debts as, under Section 17 of this Act, are not dischargeable. . . .' Under Section 17, no debt is discharged if not provable in whole or in part.* . . . The provisions of section 17 have been made applicable to Chapter XI proceedings by the express language of Section 371. Section 17 is completely discussed in Volume I, and the discussion there of the claims which come within Section 17 is applicable in determining claims excluded from a discharge under Section 371. *A debt not dischargeable under Section 17 is not dischargeable under Section 371."* (Emphasis supplied)

After examining former Section 17, this Court then looked to former Section 63a for a definition of "provable" debts and concluded that under former Section 63a "provable" means debts existing at the time of the initiatory petition. Former Section 63a is identical to Section 63a (1)-(5) of the present Act. 11 U.S.C. 103a) Both the former and present sections are found in Appendices B and C respectively).

Accordingly, the analysis by this Court in the *Zavelo* case is as sound under the present Act as it was in 1913 for the rather obvious reason that the determinative provisions of the Act (Sections 17 and 63) have remained essentially unchanged and are now made specifically applicable to Chapter XI proceedings. It is stated in 1 Collier, op. cit., Section 17.02, p. 1581:

"Section 17 should be read together with . . . Section 63 on 'Debts Which May Be Proved,' . . ."

* * *

"Section 17 provides for the release of those debts only which are defined as *provable* under Section 63, and then excepts from the effect of a discharge certain classes of provable debts. Section 17 has been drafted so that it will parallel the pattern of Section 63; when read carefully, the provisions in Section 17 should not clash in any particular with those of Section 63a."

Collier further states in Vol. 9, Sec. 7.05, p. 22:

"In applying those provisions of Section 63a, the language of the section must be adapted pursuant to Section 302. The provisions of Section 63a relating to a 'bankrupt' must be deemed to relate also to a 'debtor.' The references in Section 63a to the date or time of the filing of the petition in bankruptcy must be taken to mean, in a Section 322 case, the date of the filing of the original petition for relief under Chapter XI. . . . *Thus, the general time of cleavage, insofar as determining whether a person is a creditor, is the date of the filing of the Chapter XI petition in a Section 322 case. . . .*"

* * *

"One further adaptation of the language of Section 63a must be made for the purpose of Chapter XI. In Section 322 cases, any reference in Section 63a to the date of adjudication must be taken to mean the date of the filing of the Chapter XI petition. . . ." (Emphasis supplied)

It is submitted therefore that the critical date under the present Bankruptcy Act in a Section 322 case is, as it was in 1913, the date of filing the initiatory petition, *not* the date of confirmation.

> "The firmly established general rule is that the provability of a claim depends upon its status at the time the petition is filed." Collier, op. cit., Vol. 3A, Section 63.04, p. 1772.

The sole exception to this rule is created by present Section 63b (11 U.S.C. 103b) in *involuntary* bankruptcy cases, which has no application to a Chapter XI proceeding, the latter, of necessity, being a voluntary proceeding. See, 9 Collier, Ibid., Sec. 7.05, pp. 23-25.

The adverse consequences of the Utah decision, a few of which are noted above, apply equally as well to any debtor relief proceeding under Chapters X, XII, or XIII of the Bankruptcy Act. The confusion created by this decision, particularly for those potential creditors outside Utah; the pitfalls for the unwary creditor created by this decision; the obstacles created by this decision for a debtor seeking rehabilitation rather than liquidation; and the general adverse affect upon debtor relief proceedings in the State of Utah make this case a particularly appropriate and urgent one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted this — day of May, 1969.

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(Appendices A, B, C and D follow)

APPENDICES

APPENDIX A

In The Supreme Court Of The State Of Utah

Mojave Uranium Company,
a Nevada corporation,
Plaintiff and Appellant,

vs.

Mesa Petroleum Company,
Defendant and Respondent.

No. 11286

FILED
March 5, 1969

L. M. Cummings,
Clerk

HENROID, Justice:

Appeal from a summary judgment of no cause of action in a case where Mojave claimed Mesa assumed an obligation of Standard Gilsonite to pay a claim held against the latter by Mojave that existed over three years earlier, and which Mesa allegedly took over by acquiring the assets and liabilities of Standard in September, 1965. The trial court said that although there may have been such an obligation, it was discharged in bankruptcy. We affirm with costs to Mesa.

Back before 1962, Standard Gilsonite, under the pilotage of one Pinder, became indebted to Mojave, and, with personal property of highly questionable value, signed a note and chattel mortgage, which latter was recorded. Standard became insolvent and on May 25, 1962, filed a petition under Chapter XI of the Bankruptcy Act,[1] (known as the Chandler Act of 1938) said chapter having to do only with *unsecured* creditors as opposed to other types of claims.[2] Thereafter Mojave,

1. 11 United States Code, Secs. 701-799.

2. See 9 Collier on Bankruptcy (14 Ed.) Sec. 8.01, p. 157, which states as follows: "The limitation on an arrangement under Chapter XI so that it can deal only with **unsecured** creditors is one of the principal fundamental differences between a Chapter XI proceeding and a proceeding under Chapter X. XII, or XIII. Under Chapter X, secured as well as **unsecured** debts, and right of stockholders, may be affected by a plan of reorganization. Under Chapter XII, debts secured by real property or a chattel real of a debtor, and **unsecured** debts, may be affected by an arrangement, but **unsecured** debts alone can not be affected. Under Chapter XIII, secured and **unsecured** debts may be affected by a wage earner's plan." (Emphasis supplied.)

which technically was a *secured* creditor, some time in June, 1962, in an agreement signed by Standard and Mojave, acknowledged that Standard was insolvent, that the latter had filed under Chapter XI, and that "This agreement is entered into with the knowledge that unless a Chapter XI . . . is successful, Mojave would receive nothing, or very little, by way of their present secured position." These concessions were made over three years before the instant action was instituted, but the "prime" attorney, as plaintiff calls him, virtually confirmed the worthlessness of the so-called security in his deposition. Nonetheless, this agreement which released the security in exchange for an unsecured claim, must have impressed the trial judge, as it does us, that the transmutation of a secured debt into an unsecured claim was designed for no other reason or purpose than that Mojave could take advantage of Chapter XI and salvage something from Standard's insolvency, rather than nothing. Hardly could one venture the conclusion that any such a stance could result three years later in any retransmutation to a status prior to Standard's filing under Chapter XI—so far as equity is concerned. We believe that all things being equal, unless the Bankruptcy Act itself condones such a chameleonic result, —at least in equity, someone should not have his cake and eat it, —should be estopped to tie a new knot where a predecessor one had been untied, —or should be held to have waived, abandoned or otherwise deserted any novel claim asserted years later, —whatever you choose to classify or define it.

This brings us to the Chandler Act itself and the Zavelo case[3] with which appellant to urgently and not without merit tantalizes us. He contends that irrespective of all else, Zavelo says that the time at which the debt is *determined* is the *date that the petition was filed,* —none other. He quotes 9 Collier, Sec. 7.05, p. 22, volunteering that "following the rule of Zavelo v. Reeves," that "thus, the general time of cleavage, insofar as de-

3. Zavelo v. Reeves, 227 U. S. 625, 33 S. Ct. 365, 57 L.Ed. 676 (1913).

termining whether a person is a *creditor* is the date of the filing of the Chapter XI petition in a section 322. . . ." The Collier statement necessarily does not justify counsel's gratuity of "following the rule of Zavelo v. Reeves," in the atmosphere in which the text discussion was conducted. Collier did not cite Zavelo in support of the statement. It is conceded that Zavelo has been cited by Collier and by dozens of cases involving regular bankruptcies since 1898 in support of the rules that 1) only debts existing at the time of filing the petition are provable and 2) a provable debt dischargeable in bankruptcy effectively may be revived or payable by virtue of a clear, unequivocal promise to pay. We have found no case in our research that cites Zavelo as being applicable to a Chapter XI case, —nor has counsel cited one.

We believe the reason the Zavelo is not applicable to a Chapter XI case is because of its incompatibility with the widely extended objectives of the Chandler Act and its modified philosophy designed to prevent bankruptcy rather than merely to furnish a sanctuary immunizing one against continuous harrassment in a hopeless situation of financial despair.

Chapter XI itself seems to evince such purpose and malleability designed to save rather than sink a debtor. Counsel for plaintiff quite fairly and frankly seems to concede the change represented by the new law which in much greater degree favors the distressed debtor over his brethren of yesteryear. He says:

> . . . Upon the filing of a Chapter XI proceeding the debtor is brought within the protective umbrella of the court which, under the Act can issue various protective orders for the benefit of the debtor and his business, all with a mind to keep the business going and to give the debtor breathing space while he attempts to work out a satisfactory arrangement with his *unsecured* creditors.

Sections of Chapter XI call for (356) provisions for changing rights of unsecured creditors, (357) treat-

ing the claims on a parity or division into classes, with treatment in different ways or on different terms, for continuation of a debtor's business, to *provide payment of debts incurred after the filing of the petition and during the pendency of the arrangement,* retention of jurisdiction by the court, and for "any other appropriate provisions not inconsistent with this chapter."

Such provisions would seem to anticipate and cover a case such as we have here, where a creditor may have a claim purportedly secured by personal property that virtually appears to be worthless, and where the creditor might, after the filing of the petition, agree to release or waive such security, and say, (all of which seems to be the case here) "I acknowledge I am a secured creditor, but almost in name only, and being an unsecured creditor now and in reality, I will submit to the conditions of an arrangement, after the filing, but before the order confirming any arangement is concluded."

It seems to us that where a creditor takes such a position at the time of his debtor's adversity, hardly can it say subsequently and after three or four years of quiescence that "Now that you have become prosperous, I will advise that whatever I did to change my creditor status, I now disconfirm, confirming my status at the time that you filed your petition, and disconfirm the order confirming the arrangement, and I do this under the authority of Zavelo v. Reeves, although I am unable to find a case citing this landmark decision in a Chapter XI, Chandler Act environment." Counsel for appellant, I opine, will espouse a somewhat different conclusion, but the trial court's result in this case points up the difference between 1898 and 1938. The only cases, which are not numerous, nonetheless support the thesis that in a Chapter XI proceeding, Zavelo is not controlling as to dischargeability based on the date of filing the petition. Rather, they support respondent's urgence that unsecured claims are *determinable and dischargeable as of the date the arrangement ultimately is confirmed under the provisions of Sections 367 and 371 of the Act,* —and such a conclusion does not seem terribly unreasonable

considering the obviously new approach under the Chandler Act, and under the apparently on-again-off-again factual switches in this case in an apparent effort to gain creditor advantage, but upon failure to accomplish such advantage, attempt to revert to a creditor status that appellant completely had abandoned, deserted and waived.

Without abstracting the facts in the cases mentioned hereunder we commend the reader to some that seem to conclude that the order confirming the arrangement in a Chapter XI case determines the rights of *all* unsecured creditors who were such at the *time of confirmation,* irrespective of their status at the time a petition was filed.[4]

This court has but fleeting kinship with federal bankruptcy matters, to which counsel for appellant no doubt will amen, but respects the pronouncements of the federal courts that have a greater closeness and acquaintance with the federal bankruptcy laws, —with which the instant case is concerned. In McAbee v. Isom,[5] Circuit Judge Sibley said "It thus appears that claim proven as a secured claim is always potentially an unsecured one. If the security fails in whole or in part the equity of the case will generally require that recognition be given the unsecured debt." In re: Berkshire Hdw.,[6] the court recognized that the Zavelo rule that only those debts provable at the time of a petition for bankruptcy has been modified by the provisions of the 1938 Chandler Act.

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4. Frey v. Frankel, 361 F.2d 437 (1966), where a contract entered into after a Chap. XI petition was filed and before confirmation of an arrangement ensued, Mr. Judge Pickett of the Tenth Circuit, in which our court also sits, said . . . "when the **order of confirmation became final, the rights of the party were fixed as of its entry**, . . . When the plan became effective, Frey's position with the corporation was terminated, and he had no legal right to employment." In Wm. H. Wise v. Rand McNally, 195 F.Supp. 621 (1961), during pendency of a Chap. XI proceeding, a secured creditor at time of the filing entered into a stipulation that made it a half secured and half unsecured creditor, and as to the unsecured phase, the order of confirmation, not the date of filing the petition, was controlling.

5. 116 F. Rep. 1001 (1940), decided after the 1938 Chandler Act.

6. 39 F. Supp. 663 (1941).

Two other points on appeal persist: 2) That regardless of a discharge of the alleged debt, it was revived and made enforceable by Standard's June, 1962, agreement to pay it. This claim admittedly was worth nothing or very little. The so-called agreement, which appellant must have renounced, since in this suit it said it remained a secured creditor, has the complexion of inconsistency seemingly engendered by one Pinder, president of Standard, then of Mesa, and a relative of and intermediary for those of Mojave, which, according to this record reasonably could convince a trial judge that the alter-ego-paterfamilias relationship was designed to recover something now, failing which, reservation of rights might provoke a second and possibly a third try to revive a corpse that may, by some sort of miracle, resurrect itself. We go along with the trial court in discounting Point No. 2 on the facts. Point No. 3, that there was an enforceable contract for the benefit of a third party, is as unimpressive as Point No. 2. It appears that the trial court, under the facts of this case, highly confusing and contradictory as they are, without any sworn testimony save that contained in a deposition of a lawyer that added litle to, but detracted from clarity, decided, as did the state court, to let the corpse of this case rest in peace.

It is not reflected in the record by findings and/or conclusions, what the trial court specifically had in mind about points 2 and 3, but it is not difficult to conclude that from the elusiveness of the record, where no promisory note definitely was executed, or for that matter unconditionally intended, as was the case of a chattel mortgage, apparently never executed, or intended, the trial court was not in error.[7] At best, the record reflects

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7. This court, in many cases has indulged the presumption that where the trial court did not make a specific finding on a particular phase of a case, that if such finding had been made it would be in harmony with the decision rendered. Probably the best statement of this proposition was made by Mr. Justice Wade in Mower v. McCarthy, 122 Utah 1 (1952), 245 P.2d 224, where it was stated that "In reviewing a case of this kind where issues of fact are involved and there are no findings of fact, we do not review the facts but assume that the trier of the

failures to comply with conditions, executions of documents, recordation or delivery of papers vital to appellant's last two points. It seems that the trial court reasonably could disagree with appellant, where the only "live" testimony,—that of the so-called "prime" lawyer's deposition and an affidavit, reflected, in its and our opinion, a fact situation that, if believed by the trial court, negated any unequivocal, unconditioned promise to pay anything to anyone is a definite amount. Among other things it was conditioned on other kinfolk creditors agreeing on the same terms, which the record does not reflect materialized, and a take-over agreement that seemed to be a family or Pinder arrangement, without any real evidence of execution or delivery, does not impress us with appellant's urgence.

We believe that this case represents a belated effort to salvage something from a situation forgotten but brought to mind by change of circumstance, technical bankruptcy talk, hope for renewed existence of a given-up effort, *supplemented by a 1913 Zavelo pronouncement, which we deem not authoritative under Chap. XI of the Chandler Act of 1938*, or the facts of this case.

WE CONCUR:

E. R. Callister, Jr., Justice

R. L. Tuckett, Justice

CROCKETT, Chief Justice: (Concurring)

I concur in affirming the judgment, adding these observations:

I have no doubt that if it be shown that a debtor desired that a particular debt be paid, and that he made a valid contract with a third party for that express purpose, the latter would be bound to fulfill that obligation. But this case was not presented to the court below on that theory and we should not be concerned with it on

facts found them in accord with its decision, and we affirm the decision if from the evidence it would be reasonable to find facts to support it."

appeal.[1] In the posture in which this case was presented to the trial court, where both parties moved for summary judgment on the basis of the pleadings, deposition and documentary evidence, and where each insists that it is entitled to judgment as a matter of law,[2] the fair and reasonable inference to be drawn is that Mesa Petroleum Company took over the assets and liabilities of Standard Gilsonite in such a way as to stand in its shoes.

It is important that plaintiff Mojave was fully informed of the Chapter XI bankruptcy proceedings in which it was originally listed as a secured creditor; and that the so-called new promise to pay the Mojave obligation was made in connection with changing itself to an unsecured creditor status. This occurred in June and thus two months before the order of confirmation of the Referee in Bankruptcy which acts the same as a discharge in bankruptcy as to the unsecured creditors.[3]

ELLETT, Justice: (Dissenting)

I dissent. This case can be determined upon a basis not related to the rules of a bankruptcy proceeding, to wit, upon a third party creditor beneficiary contract. It was decided in the court below upon a motion for summary judgment, and in order for the ruling to stand, the defendant had to be entitled to judgment as a matter of law. In my opinion the law is against the defendant on the issue raised, to wit, whether bankruptcy discharged a debt of another corporation.

On September 10, 1965, Standard Gilsonite Company entered into a written agreement with the defendant, Mesa Petroleum Company, whereby Mesa took over all the assets (except certain specified funds) of Standard and promised to pay all debts of Standard set forth in Exhibit "A" attached to the agreement. The

1. Pettingill v. Perkins, 2 Utah 2d 266, 272 P.2d 185.

2. To be distinguished from situations where the position of one or both parties is that, if the summary judgment is denied, they will present proof which will entitle them to recover. See West v. West, 15 Utah 2d 87, 387 P. 2d 686.

3. Sec. 371, Chap. 11 of the Bankruptcy Act; and see Poly Industries, Inc. v. Mozley, 362 F.2d 453 (1966).

debt of Mojave in the amount of $20,000 was listed on the document attached.

If we assume that the opinion of the court is correct[1] in holding that the claim of Mojave was barred by the Chapter XI proceeding of Standard, that is not to say that this defendant can take refuge behind the bankruptcy of Standard. A discharge in bankruptcy does not remove from a bankrupt the moral obligation to pay the debt. It simply takes the right to sue away from the creditor. The obligation on the part of the discharged debtor to pay is a sufficient consideration to support a definite promise made by him to pay that debt, and the old creditor can sue on the new promise as made.[2]

In this case the suit against Mesa is not based upon the old promise made by Standard. It is upon a new promise made by Mesa to pay a debt which Standard owed to the plaintiff, a debt which Standard never did pretend that it did not owe. Its books always showed the debt to be a liability owing to Mojave. It is only Mesa which claims that Standard did not owe the debt, ergo Mesa did not owe it.

Even if Standard did not owe the debt, still it could have made Mojave a donee beneficiary by requiring Mesa to pay Mojave in return for taking the assets of Standard. Whether Standard owed Mojave or not is of no concern to Mesa.

The law in this regard is succinctly stated in 4 Corbin on Contracts, §818, where the cases are collected. It says:

> Observe further that the promisee may have many good defenses in a suit brought against him by the third party that would not be operative in a suit against the promisor by the third party. The contract may have been made by the promisee for the purpose of settling some ill-

1. Which I do not do.
2. Zavelo v. Reeves, 227 U. S. 625, 33 S. Ct. 365, 57 L.Ed. 676, 678 (1913).

> founded claim of the third party; . . . The duty owed by the promisee to the third party may have become barred by statute of limitations or in bankruptcy; such a bar will not avail the promisor. . . .

Enough is stated here to convince me that Mesa should not be relieved of its promise to pay Mojave. However, since this is a dissent, I will point out what I consider to be other defects in the reasoning of the main opinion.

I cannot agree with the main opinion holding that the claim of Mojave was barred even as to Standard. Standard filed its petition under Chapter XI of the Bankruptcy Act, which chapter affects only the *unsecured* creditors of a debtor. An arrangement with the unsecured creditors was proposed on May 25, 1962, and was confirmed by an order signed August 13, 1962. The arrangement made no provision for the secured debts but did list that of Mojave in Schedule "B" as a secured debt.

Standard was advised by its counsel that it would have to deal with the secured creditors separately and individually and would have to resolve those secured debts as best it could. In his deposition, said counsel stated that the intention was to compromise and settle the secured claims and not to list them in the arrangement proceedings. Pursuant to the advice of counsel, Standard did make separate agreements with Mojave, Field Services, and Tennessee Gas. Thereafter settlements were made with all save Mojave.

At the time of filing its petition, Standard's books of account showed a debt owing to Mojave in the amount of $26,000, some $18,325.82 of which was secured by a second mortgage on mining equipment, on certain automobiles, and on its office furniture and fixtures. The debt was payable at the rate of $20 per ton of ore mined.

Sometime in June, Standard and Mesa entered into a new agreement whereby Standard promised to

sign a new note for $20,000, to give a chattel mortgage to secure the note, and to pay it off at the rate of $2,000 per year in place of the original debt. Mojave released its second mortgage, but Standard never did sign a note nor give a chattel mortgage for the substituted debt. Thereafter Standard carried the debt on its books at $20,000.

I would think that the unsecured part of the debt was covered by the confirmation. While no unsecured debt of Mojave was listed, still Mojave knew of the proceedings and, therefore, would be bound to the extent of the unsecured portion of the debt.

The main opinion says that the case of Zavelo v. Reeves[3] applies to regular bankruptcies only. The language of the case is clear:

> It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the peti-

3. Id.

tion and before the discharge as if made after the discharge.

The reasoning therein stated applies to Chapter XI proceedings as well as to ordinary bankruptcies. Where is the line of cleavage between debts and assets belonging to the bankruptcy court and those belonging to the petitioner in a Chapter XI proceeding? If that line is at the time of filing the petition, then the creditors will be listed and will receive notice of future proceedings. They should vote either to approve or reject the proposed arrangement. In fact, a creditor without knowledge who is omitted from the arrangement is not bound by the confirmation thereof.[4] To hold all unsecured debts incurred after the petition has been filed but before confirmation to be barred might make it impossible for a debtor to raise the necessary funds to offer his creditors in his proposed arrangement. His earnings after the filing of his petition should be his, so that he could carry out his proposed plans; and if the earnings are his, his new debts incurred in making this money likewise should be his, and his alone.

The question involved is discussed in 3 Collier on Bankruptcy, §63.04, as follows:

> The firmly established general rule is that the provability of a claim depends upon its status at the time the petition is filed. The general rule, however, is now subject to certain statutory qualifications. The Act of 1938 provides in §63b that "in the interval after the filing of an involuntary petition and before the appointment of a receiver or the adjudication, whichever first occurs, a claim arising in favor of a creditor by reason of property transferred or services rendered to the bankrupt for the benefit of the estate shall be provable to the extent of the value of such property or services." This new provision derogates from the general principle that claims accruing

4. 9 Am. Jur. 2d Bankruptcy § 1331.

> after bankruptcy follow their own and special rules of allowance and do not constitute provable claims within the provisions of §§57, 63. Likewise, the Act of 1938 makes provable "contingent debts and contingent contractual liabilities" and expands the provability of claims for anticipatory breach of executory contracts. But aside from such specifically provided exceptions the principle prevails that "the filing of the petition is the crucial time in nearly all matters arising in bankruptcy proceedings, provided adjudication follows." . . .

What this seems to say is that creditors many not share in assets under a plan when the obligation is incurred after the petition is filed unless the debt is incurred by the bankrupt so as to bring assets into the estate for further distribution among the creditors. It does not say that the debt is discharged. It simply says that the creditor may participate.

In this matter nothing was brought into the bankrupt's estate because as the opinion of the court points out, the second mortgage had become practically worthless.

None of the cases relied upon in the prevailing opinion, as I interpret them, support the conclusions drawn therein. Let us examine them.

In Frey v. Frankel, 361 F.2d 437 (1966), a corporation filed a petition pursuant to Chapter XI of the Bankruptcy Act. Frey, the former president and chief stockholder of the corporation, undertook to raise funds with which to finance an arrangement. During preliminary discussions between Frey and Frankel, they decided that a change in ownership of the controlling stock would be required and that the plan to be submitted would provide that Frey should be given an option to purchase one third of the new stock, and in addition he would have a five-year contract of employment at a salary of $2,000 per month. The creditors would not

approve the proposed plan. Thereafter Frey submitted a different plan, which was approved by the creditors, wherein Frankel was to be chief managing officer and Frey was given no right to purchase the stock nor to have a five-year contract. This plan was confirmed by the court, and the charter of the corporation was amended to provide for the issuance of the new stock.

Frey and Frankel fell out, and this action resulted, wherein Frey claimed damages for not getting a five-year contract of employment at $2,000 per month; for rescission and so forth; and for his share of the stock. Since neither Frey's option to purchase nor his employment agreement was included in the plan, he had no rights under that plan, and what the court held in effect in the case was that when the order of confirmation became final, the rights of the parties were fixed as of its entry. There was no holding that a debt of the corporation incurred subsequent to the filing of a petition was discharged. The corporation was the debtor in the proceedings, and all that the holding in this case amounts to was the Frey never got any rights because they were not stated in the arrangement.

Another case relied upon in the prevailing opinion is that of Wm. H. Wise & Company, Inc., v. Rand McNally & Company, 195 F. Supp. 621 (1961). There the plaintiff furnished material and engaged the defendant to print and bind 25,000 copies of a book for it. Wise filed for arrangement proceedings, and Rand McNally filed a proof of claim for some $20,035.18 and stated that it held almost 14,000 copies of the book as security for the debt. Wise filed objections on the ground that the value of the security had not been evaluated. Finally the parties stipulated that the value of the books held was $10,017.59, which was exactly one half of the amount of the debt due and owing. The other one half of the debt was allowed as an unsecured claim for which the defendant might share in the payments under the plan. Rand McNally ultimately sold some 2,000 copies of the book to a third person without notice to Wise. The question before the court was whether the defendant

was liable for conversion of the books sold. The case is interesting if one cares to learn about liens and conversion, but I do not find any holding or even any discussion to the effect that a debt incurred subsequent to filing of a petition is barred by confirmation.

Another case relied upon by the main opinion is McAbee v. Isom, 116 F. 2d 1001 (1940), (not 116 F. Rep. 1001 as cited). There a creditor filed her claim originally as a secured creditor. At the time, she had the real property of the debtor under attachment in an action pending in a state court. When a prior attachment defeated the security of the creditor, she moved to amend her claim to show it as being unsecured. This amendment was disallowed by the trial court. The Fifth Circuit Court of Appeals reversed and held that the amendment should have been permitted. The case does not hold that an unsecured debt acquired after the filing of a petition is barred by confirmation. It simply is not in point. The debt pre-dated the filing of the petition and was, unknown to the creditor, unsecured all of the time.

The other case relied upon by the prevailing opinion is that of In re Berkshire Hardware Co., Inc., 39 F. Supp. 663 (1941). There the law of the state required an employer to pay a percentage of its payroll into a state fund. The bankrupt was an employer and paid its contributions to April 1, 1939. On March 22, 1939, an involuntary petition in bankruptcy was filed against the employer, and on June 19 of that year it was adjudicated a bankrupt. A receiver was appointed and continued the business until July 11, 1939, when a trustee was appointed, who ran the business thereafter for a short time. The receiver and the trustee paid the contributions during the time they operated the business. The state filed a claim for contributions due from April 1, 1939, to June 19, when the receiver took over. This claim was filed after the filing of the petition and was for a debt incurred subsequent to said filing. The claim was disallowed by the referee. In discussing this matter the court held:

There is ample authority for the proposition that debts provable under section 63 of the Bankruptcy Act, 11 U.S.C.A. §103, include only those existing at the time of the filing of the petition in bankruptcy. Zavelo v. Reeves, 227 U.S. 625, 33 S.Ct. 365, 57 L.Ed. 676, Ann. Cas. 1914D, 664; Williams v. United States Fidelity & Guaranty Co., 236 U.S. 549, 35 S.Ct. 289, 59 L.Ed. 713; In re Miller, D. C., 25 F. Supp. 336.

This rule has been modified by the provisions of section 63, sub. b of the Bankruptcy Act of 1938, 11 U.S.C.A. §103, sub. b, known as the "Chandler Act." This new section permits a claim, arising after the filing of an involuntary petition, to be proved if it arises by reason of property transferred or services rendered by the creditor to the bankrupt for the benefit of the estate. The claim of the Commonwealth of Massachusetts cannot be said to come within the scope of this section. The claim, therefore, is not provable as a debt.

If, however, as the Commonwealth contends, the Massachusetts Unemployment Compensation Law imposes a tax rather than creates a debt, a different situation is presented. The first question to be considered, therefore, is whether the "contributions" required by that law may be regarded as a tax.

That court held the claim to be allowable because it was a tax and not a debt. There a claim was filed, and was disallowed as a *provable claim for debt*. The court did not hold that the debt was discharged. It merely held that the claimant whould not be allowed to share in the assets for distribution if the claim was based upon a debt which was incurred after the filing of the petition.

Defendant herein also attempts to raise the question of lack of consideration for the debt which Standard owed in the first place. Since the suit is upon the promise

of Mesa and not upon the promise of Standard, this would no more be a defense to this defendant than would bankruptcy.

I would reverse the trial court and remand the case for the entry of judgment in favor of plaintiff and against defendant for $20,000. I would also award costs to the appellant.

APPENDIX B

Pertinent Parts of Bankruptcy Act of 1898, in Effect at This Court's Decision in *Zavelo v. Reeves*.

Sec. 12. (11 U.S.C. §30) Compositions, when Confirmed.—*a.* A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, after, but not before, he has been examined in open court, or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of the estate, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.

b. An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c. A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d. The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts

or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e. Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

* * *

Sec. 14. (11 U.S.C. §32) Discharges, when granted.—

* * *

c. The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

* * *

Sec. 17. (11 U.S.C. §35) Debts not affected by a discharge.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

Sec. 63. (11 U.S.C. §103) Debts which may be proved.—*a.* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

APPENDIX C

Pertinent parts of Bankruptcy Act of 1938 ("Chandler Act") in effect during Chapter XI proceedings of Standard Gilsonite Co.

§17 (11 U.S.C. §35) Debts Not Affected by a Discharge. a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiudciary capacity; (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment.

* * *

§ 63. (11 U.S.C. § 103) Debts Which May Be Proved. a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) costs taxable against a bankrupt who was at the time of the filing of the petition by or against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) a claim for taxable costs incurred in good faith by a creditor before the filing of the peition in an action to recover a provable debt; (4) an open account, or a contract express or implied; (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments; (6) an award of an industrial-accident commission, body, or officer of any State having jurisdiction to make awards of workmen's compensation in case of injury or death from injury, if such injury occurred prior to adjudication; (7) the right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy; (8) contingent debts and contingent contractual liabilities; or (9) claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property: *Provided, however,* That the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the land-

lord, which ever first occurs, whether before or after bankruptcy, plus an amount equal to the unpaid rent accrued, without acceleration, up to such date: *And provided further,* That in the case of an assignment of any such claim for damages, the court shall, in determining the amount thereof, examine the circumstances of the assignment and the consideration paid or to be paid therefor, and may allow the claim of the assignee in such amount, subject to the provisions of the foregoing proviso of this clause (9) as will be fair and equitable.

b. In the interval after the filing of an involuntary petition and before the appoitment of a receiver or the adjudication, whichever first occurs, a claim arising in favor of a creditor by reason of property transferred or services rendered by the creditor to the bankrupt for the benefit of the estate shall be provable to the extent of the value of such property or services.

c. Notwithstanding any State law to the contrary, the rejection of an executory contract or unexpired lease, as provided in this Act, shall constitute a breach of such contract or lease as of the date of the filing of the petition initiating a proceeding under this Act.

d. Where any contingent or unliquidated claim has been proved, but, as provided in subdivision d of section 57 of this Act, has not been allowed, such claim shall not be deemed provable under this Act.

* * *

CHAPTER XI

Sec. 322. (11 U.S.C. §722) If no bankruptcy proceeding is pending a debtor may file an original petition under this chapter with the court which would have jurisdiction for a petition for his adjudication.

* * *

Sec. 337. (11 U.S.C. 737) At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—

(1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court in such amount as the court shall fix; and fix the amount or rate of such person's compensation, not in excess of the compensation allowable to a receiver under this Act;

(2) fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the order of the court, the consideration, if any, to be distributed to the creditors, the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims or such deposit, or consented in writing to any provision of the arrangement for otherwise dealing with such claims, and the money necessary to pay the costs and expenses of the proceedings, and the actual and necessary expenses, including fees and expenses of attorneys, accountants and agents, in such amount as the court may allow, incurred after its appointment by a committee-appointed puruant to section 338 of this Act, or incurred before or after the filing of the petition under this chapter by a committee designated in writings, filed with the court and signed and acknowledged by a majority in amount of unsecured creditors whose claims have been scheduled otherwise than as contingent, unliquidated or disputed and who would not be disqualified by section 44 of this Act to participate in the appointment of a trustee: *Provided, however,* That in fixing any such allowances the court shall give consideration only to the services which contributed to the arrangement confirmed or to the refusal of confirmation of an arrangement, or which were beneficial in the administration of the estate, and the proper costs and expenses incidental thereto; and

(3) fix a time for the filing of the application to confirm the arrangement and for a hearing on the con-

firmation thereof or any objections to the confirmation, unless such times have already been named in the notice of the meeting or unless all creditors affected by the arrangement have accepted it.

* * *

Sec. 371. (11 U.S.C. 771). The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, but excluding such debts as, under section 17 of this Act, are not dischargeable.

APPENDIX D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY STATE OF UTAH

MOJAVE URANIUM COMPANY, a Nevada Corporation, Plaintiff, vs. MESA PETROLEUM COMPANY, a corporation, Defendant.	SUMMARY JUDGMENT Civil No. 162585

The above-entitled matter came on for hearing, pursuant to defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment; and notice having been given pursuant to the Utah Rules of Civil Procedure, Mojave Uranium Company, a Nevada Corporation, represented by and through its counsel of record, Robert M. McRae of Hatch & McRae, and defendant being represented by James R. Brown of Neslen and Mock; and the Court having before it Motions on behalf of both parties, and after hearing argument by counsel for the respective parties, and for good cause appearing therefor, the Court hereby enters its Summary Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the plaintiff's Motion for Summary Judgment is denied and that defendant's Motion for Summary Judgment is granted in that plaintiff's alleged claim is barred under the provisions of the Bankruptcy Act, and defendant is hereby awarded his costs.

DATED this 29th day of April, 1968.

BY THE COURT

STEWART M. HANSON

JUDGE

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 26 1969
JOHN F. DAVIS, CLERK

No. 165

In the Supreme Court of the United States

OCTOBER TERM [redacted] 1969

MOJAVE URANIUM COMPANY
a Nevada corporation,
Petitioner,

vs.

MESA PETROLEUM COMPANY
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF IN OPPOSITION FOR RESPONDENT MESA PETROLEUM COMPANY

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No. 1449

In the Supreme Court of the United States

OCTOBER TERM 1968

MOJAVE URANIUM COMPANY
a Nevada corporation

Petitioner,

vs.

MESA PETROLEUM COMPANY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF IN OPPOSITION FOR RESPONDENT MESA PETROLEUM COMPANY

QUESTION PRESENTED

In an apparent effort to interest this Court and to obtain a Writ of Certiorari, petitioner has misstated the question presented and therefore respondent submits the following as the real question presented:

Under the unique and isolated fact situation of this case, what effect, if any, does confirmation under a Chapter XI proceeding of the Bankruptcy laws have upon a creditor which was unsecured at the time of said confirmation.

STATEMENT OF THE CASE

Sometime during the period from 1957 to 1961 Mojave allegedly loaned (R.1) to Standard sums of money uncertain both as to the amounts and as to the source of the funds so loaned. (Depo. 43 & 45). On March 2, 1960 Mojave received a second mortgage on certain personal property represented as being owned by Standard. (Ex. P-17). Standard became financially distressed during the period 1960 to 1962 and was besieged by suits, demands of creditors and repossessions. (Depo. 5, 16 & 17).

Robert J. Pinder, then president of Standard and also a close relative of the officers of Mojave, *represented Mojave* in the negotiations which culminated in the agreement to release the security. (Depo. 6, 11, 16, 38, 39). Pinder was president of Standard. The corporate entity of These alleged loans were made during the period when Mojave is and was of serious doubt, having had its charter revoked by Nevada and having failed to qualify to do business in Utah. (R. 5, 6, 7; Depo. 46). Further, there was serious question as to whether the alleged loan was actually made. (Depo. 40, 41, 43, 44, 45). Because of the questionable aspects of the Mojave claim, together with the fact that the security on the second mortgage was either nonexistent, dissipated, or worthless (Depo. 17, 19, 40, 41), and the additional threat of a Chapter X proceeding (Ex. P-6), Mojave agreed to become an unsecured creditor.

The sole consideration given to Standard for this privilege was the release of the worthless security. (Depo. 41).

Thereafter, Standard filed with the court a proposed plan of arrangement, which was confirmed by Order dated August 13, 1962 (Ex. P-3). It was not until long after the final order, when Mesa Petroleum Co. had acquired the assets of Standard, that Mojave asserted its claim to an existing debt against Standard's successor, Mesa. Mesa disputed the claim and Mojave brought suit to collect a sum of $20,000, plus interest. Among other defenses, Mesa plead a discharge in the Chapter XI proceedings and the District Court granted a Summary Judgment dismissing the claim. The Utah Supreme Court affirmed, whereupon Mojave petitioned for a Writ of Certiorari.

ARGUMENT

Petitioner concludes that the Utah Supreme Court has incorrectly interpreted and applied Section 371 of the Bankruptcy Act (11 U.S.C. 771). This conclusion is apparently based on the fact that the Utah Court failed to apply *Zavelo v. Reeves,* 227 U.S. 625, 33 S. Ct. 365, 57 L. Ed. 677 (1913), but rather applied the clear and concise language of the present day statutory provisions, enacted in 1938, relating to Chapter XI proceedings, together with Federal Court decisions interpreting and applying these provisions.

Based on this erroneous conclusion, petitioner proceeds to describe several undesirable consequences which, it asserts, will befall all future bankruptcy proceedings in the State of Utah. Stripped of its excess verbiage and the camouflage of form designed to meet the requirements of this court's Rule 19, Petitioner in effect contends:

A. The Utah Supreme Court's decision will stop trade creditors from continued extension of credit after a debtor files a Chapter XI proceeding, and that no one will advance moneys to the debtor for rehabilitation.

B. That the Utah decision effectively stops all secured creditors from dealing with the distressed debtor and forces the secured creditor to repossess his security immediately.

Counsel for petitioner does concede, however, at page 6 of his brief, that the provisions of the Chandler Act answer each of the foregoing contentions. If a debtor obtains an order authorizing it to continue in business as a "debtor in possession" under the aegis of the court pending confirmation, obligations incurred with the express or implied consent of the court are entitled to priority as costs of administration and to payment in full upon confirmation from the deposit required under Section 337 (2) of the Bankrutpcy Act. (11 U.S.C. 737 (2)). See, 9 Collier on Bankruptcy, 14th Ed., Sec. 8.11, p. 180, and Sec. 7.05, pp. 24-25. Section 367 of the Bankruptcy Act (11 U.S.C. 767) provides that the "Arrangement and its provisions shall be binding upon the debtor, . . . [and] upon all creditors . . ." upon confirmation. A creditor desiring to be protected can do so either under the cost of administration provision or by conditioning further advances of moneys upon specific protective provisions contained in the Plan of Arrangement.

The contention that secured creditors cannot now deal with the debtor is equally fallacious since a secured creditor can protect himself by remaining secured, instead of attempting to fluctuate at will between a secured and an unsecured position whenever it becomes advan-

tageous to do so. The debtor can also protect himself by making certain the Arrangement provides for his claim.

Petitioner asserts that the Utah Court failed to apply the theory of revival as enunciated by this Court in *Zavelo,* supra. The Utah Court did not follow *Zavelo,* supra, for reasons which per se answer the question presented herein, which reasons will be discussed in their order:

A. The present day statutory provisions, together with recent (after 1938) cases interpreting these provisions and their application to the facts of this case, demand the conclusion reached by the Utah Court.

B. The Utah Court based its decision on equitable grounds peculiar to the isolated and unique fact situation of this case, which unique facts were not present in *Zavelo,* supra.

THE PRESENT DAY STATUTORY PROVISIONS AND CASE LAW SUPPORT THE UTAH DECISION

The Chandler Act, which was passed in 1938 and is the present day statutory provision relating to Bankruptcy, gives broad relief for financially distressed businesses by means of composition and/or extension of unsecured obligations. The Chandler Act affords relief that could not and cannot be obtained at common law. Chapter XI proceedings under the 1938 Act are set forth in detail, together with the effects of these proceedings, in United States Code, Title 11, Section 701 et seq.

An agreement was consummated between Mojave and Standard wherein Petitioner became an unsecured creditor in the amount of $20,000. The formal agreement was executed sometime in June, 1962. (Ex. P-6 & P-7). The sole consideration for this agreement was the release of the security. (Depo. 41). Mojave was aware of the Chapter XI proceedings, and knew of the legal consequences following the release. Mojave could either release the worthless and non-existent security, or face proceedings under Chapter X of the Chandler Act. (Ex. P-6 & P-7). There is no argument that at this date Petitioner did in fact release its security.

The real question before this Court is what effect, if any, did the confirmation of Standard's Chapter XI proceedings have upon the agreement of June, 1962 which placed Mojave in the status of an unsecured creditor? The language of the Act itself answers this decisive question.

SECTION 307:

> "(1) "creditors shall include the holders of all unsecured debts, demands or claims of whatever character against a debtor . . ."

SECTION 308:

> "A creditor shall be deemed to be "affected" by an arrangement only if his interest shall be materially and adversely affected thereby."

SECTION 367:

> "*Upon confirmation* of an arrangement —
>
> (1) *the arrangement* and its provisoins *shall be binding upon the debtor,* upon any person

issuing securities or acquiring property under the arrangement and *upon all creditors of the debtor, whether or not they are affected by the arrangement, or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable;*" (emphasis added)

SECTION 371:

"*The confirmation* of an arrangement shall *discharge* a debtor from all his *unsecured* debts and liabilities provided for by the arrangement." (emphasis added)

Congress gave further expression to the importance of the binding effect of the arrangement upon *unsecured* creditors which are *unsecured* on the critical date of confirmation in Section 381. This provision refers to proceedings wherein bankruptcy in the usual sense becomes necessary after a confirmation has failed and the debtor is adjudged a bankrupt. This generally occurs when the terms of the arrangement have been breached or become impossible. It then becomes necessary to provide for the unsecured obligations incurred *after* the confirmation. Section 381 states:

"Where, after the confirmation of an arrangement, the court, shall enter an order directing that bankruptcy be proceeded with . . .

(1) the unsecured debts incurred by the debtor *after the confirmation* of the arrangement and before the date of the entry of the final order directing that bankruptcy be proceeded with shall, unless and except as otherwise provided in the arrangement or in the order confirming the arrangement, share on a parity with the

> prior unsecured debts of the same classes, provable in the ensuing bankruptcy proceeding, and for such purpose the prior unsecured debts shall be deemed to be reduced to the amounts respectively provided for them in the arrangement, less any payment made thereunder;"

Obviously, there is no need to provide for a creditor who was unsecured at the time of confirmation since Congress had already provided that they would be bound upon confirmation.

Section 357 of the Chandler Act provides:

> "An arrangement made within the meaning of this Chapter may include —
>
> (1) provisions for treatment of unsecured debts on a parity one with the other, . . ."

In effect, Mojave is now before this Court seeking a better and more desirable position than other general unsecured creditors.

In speaking of the provisions of Section 367 (1), *Collier on Bankruptcy,* 14th Edition, Volume 9, Section 9.25(5), page 340-341 states

> "That reference to creditors is a sweeping one. It is not essential to confirmation that an arrangement be accepted by all creditors, but creditors who have not accepted the arrangement as well as creditors who have accepted it, are bound upon confirmation. A creditor cannot escape the effect of an arrangement by not filing a proof of claim; such a creditor, as well as creditors who have filed their claims, is bound upon confirmation. Nor is it material whether a creditor's claim has been scheduled, or is allowed, or is even allowable, or

> whether the creditor is affected by the arrangement. That creditor is nevertheless bound by the arrangement and its provisions upon confirmation. Even if a creditor is affected by the arrangement, and it makes no provision for him, so that he could have successfully opposed its confirmation, he is nevertheless bound by the arrangement and its provisions upon confirmation."

In *Gerson v. Booth Lumber Company,* 230 F.2d 631 (1955) which was decided under the Chandler Act, Justice Fee of the Ninth Circuit Court of Appeals stated at page 633:

> "It is correct to say that a *plan of arrangement is not binding on the debtor or the creditors* of the debtor *until it has been confirmed by the order of the Referee.*" (emphasis added)

Collier's Bankruptcy Manual, Second Edition, edited by Edelman and as revised by William T. Laube and W. J. Hill (1968), pages 1098-1099 states:

> "An arrangement becomes effective *only upon confirmation by the Court.*" (emphasis added)

Confirmation is the vital and key step which binds and discharges all unsecured obligations. The importance of the confirmation is expressed in *In Re Graco, Inc.* 366 F.2d. 257 (1966) at page 260 as follows:

> "It is clear that the determination of the referee is not supposed to be a perfunctory one, and the fact that the plan has been accepted by a requisite majority of creditors does not dispense with the need for the referee to exercise his 'own independent judgment.'" (citations omitted)

The clear and unambiguous language of Section 367 and the judicial pronouncement in *In Re Vulcan & Reiter* Co., 162 F.2d 92 (1947), a per curiam decision is indicative of the provisions of Chapter XI. At page 94 it states:

> "... It makes no difference that petitioner did not actually consent to the composition, the consent of the majority in number and amount of creditors has the same legal effect as actual consent by petitioner, having received what they bargained for or what was bargained for in their behalf as the case may be, have no further claim to receive the balance of their original claims from *any* source." (Court's emphasis)

Section 371 states:

> "*The confirmation* of an arrangement shall discharge a debtor from all of his unsecured debts and liabilities provided for by the arrangement ..."

It is stated in *Frey vs. Frankel,* 361 F.2d, 437 (10th CCA, 1966), at page 442,

> "... when the order of confirmation became final, the rights of the parties were fixed as of its entry."

Standard's Order of Confirmation became final by its own terms on the 7th day of September, 1962. It is *res judicata* to the rights of Mojave and Standard. No application has been timely filed under Section 386 to set aside or modify the arrangement. To allow Mojave to usurp to a higher or more preferred position by its own self dealing on dubious claims is to thwart completely the language of the present statutory provisions, as well as the case law. The Utah Court correctly applied the

clear and unambiguous provisions of the Chandler Act and the judicial pronouncements interpreting the Act.

THE UNIQUE AND ISOLATED FACTS OF THIS CASE ULULATED FOR EQUITY, AND THE UTAH COURT RESPONDED

This case is characterized by isolated and unique facts which invoked an equitable response from the District Court and was affirmed with alacrity by the Utah Supreme Court. Mojave's alter-ego, paterfamilias and confident, Pinder, engaged in self-dealing and complicated manipulation of Mojave's creditor status to a degree that impressed both courts. Mojave's entire case is based upon Pinder's recollections and negotiations while he was president of Standard. After taking Standard to the depths of financial despair, Pinder hurdled the fence and became the champion of Mojave, asserting that in his former capacity as president of Standard he recollected certain elusive and unsubstantiated transactions between Standard's Pinder and Mojave's Pinder. When Mojave's contentions were bathed in the intense light of an inquiring court, they simply did not stand up and were summarily dismissed.

Pinder, in the negotiations with Standard, knew the security was in fact worthless. Mojave made the decision to abandon the worthless and non-existent security to better itself at the expense of other unsecured creditors. The very purpose of the Chapter XI proceedings, and one of the fundamental requirements by legislative command, is that the arrangement, before being confirmed, be made in good faith and for equal protection to creditors of the same class. Mojave reaped the benefit of its

bargain and now after the passage of five years desires to be relieved of that bargain.

The Utah Supreme Court invoked equity to strike down Mojave's claim by the following language.

> ". . . this agreement which released the security in exchange for an unsecured claim, must have impressed the trial judge, as it does us, that the trausmutation of a secured debt into an unsecured claim was designed for no other reason or purpose than that Mojave could take advantage of Chapter XI and salvage something from Standard's insolvency, rather than nothing . . . We believe . . . in equity . . . someone should not have his cake and eat it [and] should be estopped . . . or should be held to have waived, abandoned or otherwise deserted any novel claim asserted years later. . . ."

* * *

> "It seems to us that where a creditor takes such a position at the time of his debtor's adversity, hardly can it say subsequently and after three or four years of quiescence that "Now that you have become prosperous, I will advise that whatever I did to change my creditor status, I now disconfirm, confirming my status at the time that you filed your petition, and disconfirm the order confirming the arrangement, . . ."

The Utah Court refused to let Petitioner change at will its creditor status to usurp to a more advantageous position. The Utah decision concerning this unique fact situation is in accordance with well established principles of equity requiring this Court to deny its certiorari jurisdiction.

CONCLUSION

Respondent submits that the Utah Court was correct in applying the clear and decisive language of the Chandler Act as interpreted by the recent cases of *Frey v. Frankle,* supra; *In Re Vulcan,* supra; *Gerson v. Booth Lumber Company,* supra; and *In Re Graco, Inc.,* supra. It is further submitted that the holding of the Utah Court is based upon equitable considerations springing from the isolated and unique facts of self-dealing and complicated manipulation, together with the unsubstantiated and elusive recollections of the dual-roled Pinder and the refusal of the Courts to allow further manipulations.

The decisive reasoning of the Utah Court is not contrary to the prevailing statutory and case law nor equitable principles. None of the Petitioner's alleged fears relating to future Bankruptcy proceedings will in fact occur, as attested by Petitioner's own admissions. It is, therefore, respectfully requested that this Court deny the Petition for Writ of Certiorari.

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